

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

Larry J. Miller

Plaintiff,

v.

Lowe's Home Centers, LLC; David
Berlin; and DOES 1 to 20

Defendants.

Case No.: 2:21-CV-02308-KJM-CKD
[*Solano County Superior Court Case No.:
FCS057040*]

~~[PROPOSED]~~ PROTECTIVE ORDER

[Assigned to Hon. Kimberly J. Mueller,
District Judge; Hon. Carolyn K. Delaney,
Magistrate Judge]

Complaint Filed: August 27, 2021

The Court having read the parties' Joint Motion for the Entry of a Protective Order, and good cause appearing, the Court hereby enters the following protective order:

1. A. PURPOSES AND LIMITATIONS

Disclosure and discovery activity in this action are likely to involve production of confidential, proprietary, or private information for which special protection from public disclosure and from use for any purpose other than prosecuting this litigation may be warranted. Accordingly, the parties hereby stipulate to and petition the court to enter the following Stipulated Protective Order. The parties acknowledge that this Order does not confer blanket protections on all disclosures or responses to discovery and that the protection it affords from public disclosure and use extends only to the

1 limited information or items that are entitled to confidential treatment under the
2 applicable legal principles.

3 B. GOOD CAUSE STATEMENT

4 Federal Rules of Civil Procedure, Rule 26(c)(1) states in pertinent part, that the
5 Court, upon a showing of good cause may “issue an order to protect a party from
6 annoyance, embarrassment, oppression, or undue burden or expense.” Fed.R.Civ.P.
7 26(c)(1). In the instant matter, Defendant Lowe’s Home Centers, LLC’s Confidential
8 Documents contain proprietary and confidential trade secret information relating to
9 Defendant Lowe’s Home Centers, LLC’s business practices and its safety protocol.
10 Defendant Lowe’s Home Centers, LLC. (“Defendant” or “Lowe’s”) derives
11 independent economic value from maintaining the confidentiality of the policies and
12 procedures set forth in these Confidential Documents.

13 Defendant is a retailer in the home improvement industry and has conducted
14 business in California since 1998. The home improvement retail industry is very
15 competitive. As a result of years of investing time and money in research and
16 investigation, Defendant developed the policies contained in the Confidential
17 Documents for the purposes of maintaining the security and accessibility of its
18 merchandise, providing quality customer service, and ensuring the safety of its
19 employees and customers. These policies and procedures, as memorialized in the
20 Confidential Documents, were created and generated by Lowe’s for Lowe’s, and are
21 used for the purposes of maintaining safety at its stores and creating efficient and
22 organized work environments for its employees. As a result, Defendant is able to
23 minimize the waste of any resources, which is a key factor in generating profitability
24 for its business.

25 Defendant derives economic value from maintaining the secrecy of its
26 Confidential Documents. If disclosed to the public, the trade secret information
27 contained in Defendant’s Confidential Documents would reveal Defendant’s internal
28 operations and could potentially be used by competitors as a means to compete for its

1 customers, interfere with its business plans and thereby gain unfair business
2 advantages. If Defendant's safety protocol were revealed to the general public, it
3 would hinder Defendant's ability to effectively resolve and minimize liability claims,
4 and its goal of protecting its customers and employees from theft and other crimes.
5 Unrestricted or unprotected disclosure of such information would result in prejudice
6 or harm to Defendant by revealing Lowe's competitive confidential information,
7 which has been developed at the expense of Lowe's and which represents valuable
8 tangible and intangible assets. Accordingly, the parties respectfully submit that there
9 is good cause for the entry of this Protective Order.

10 2. DEFINITIONS

11 2.1 Challenging Party: a Party or Non-Party that challenges the designation
12 of information or items under this Order.

13 2.2 "CONFIDENTIAL" Information or Items: information (regardless of
14 how it is generated, stored or maintained) or tangible things that qualify for protection
15 under Federal Rule of Civil Procedure 26(c).

16 2.3 Counsel (without qualifier): Outside Counsel of Record and House
17 Counsel (as well as their support staff).

18 2.4 Designating Party: a Party or Non-Party that designates information or
19 items that it produces in disclosures or in responses to discovery as
20 "CONFIDENTIAL."

21 2.5 Disclosure or Discovery Material: all items or information, regardless of
22 the medium or manner in which it is generated, stored, or maintained (including,
23 among other things, testimony, transcripts, and tangible things), that are produced or
24 generated in disclosures or responses to discovery in this matter.

25 2.6 Expert: a person with specialized knowledge or experience in a matter
26 pertinent to the litigation who has been retained by a Party or its counsel to serve as an
27 expert witness or as a consultant in this action.

28 2.7 House Counsel: attorneys who are employees of a party to this action.

1 House Counsel does not include Outside Counsel of Record or any other outside
2 counsel.

3 2.8 Non-Party: any natural person, partnership, corporation, association, or
4 other legal entity not named as a Party to this action.

5 2.9 Outside Counsel of Record: attorneys who are not employees of a party
6 to this action but are retained to represent or advise a party to this action and have
7 appeared in this action on behalf of that party or are affiliated with a law firm which
8 has appeared on behalf of that party.

9 2.10 Party: any party to this action, including all of its officers, directors,
10 employees, consultants, retained experts, and Outside Counsel of Record (and their
11 support staffs).

12 2.11 Producing Party: a Party or Non-Party that produces Disclosure or
13 Discovery Material in this action.

14 2.12 Professional Vendors: persons or entities that provide litigation support
15 services (e.g., photocopying, videotaping, translating, preparing exhibits or
16 demonstrations, and organizing, storing, or retrieving data in any form or medium) and
17 their employees and subcontractors.

18 2.13 Protected Material: any Disclosure or Discovery Material that is
19 designated as “CONFIDENTIAL.”

20 2.14 Receiving Party: a Party that receives Disclosure or Discovery Material
21 from a Producing Party.

22 3. SCOPE

23 The protections conferred by this Stipulation and Order cover not only Protected
24 Material (as defined above), but also (1) any information copied or extracted from
25 Protected Material; (2) all copies, excerpts, summaries, or compilations of Protected
26 Material; and (3) any testimony, conversations, or presentations by Parties or their
27 Counsel that might reveal Protected Material. However, the protections conferred by
28 this Stipulation and Order do not cover the following information: (a) any information

1 that is in the public domain at the time of disclosure to a Receiving Party or becomes
2 part of the public domain after its disclosure to a Receiving Party as a result of
3 publication not involving a violation of this Order, including becoming part of the
4 public record through trial or otherwise; and (b) any information known to the
5 Receiving Party prior to the disclosure or obtained by the Receiving Party after the
6 disclosure from a source who obtained the information lawfully and under no
7 obligation of confidentiality to the Designating Party. Any use of Protected Material at
8 trial shall be governed by a separate agreement or order.

9 4. DURATION

10 Even after final disposition of this litigation, the confidentiality obligations
11 imposed by this Order shall remain in effect until a Designating Party agrees otherwise
12 in writing or a court order otherwise directs. Final disposition shall be deemed to be
13 the later of (1) dismissal of all claims and defenses in this action, with or without
14 prejudice; and (2) final judgment herein after the completion and exhaustion of all
15 appeals, rehearings, remands, trials, or reviews of this action, including the time limits
16 for filing any motions or applications for extension of time pursuant to applicable law.

17 5. DESIGNATING PROTECTED MATERIAL

18 5.1 Exercise of Restraint and Care in Designating Material for Protection.

19 Each Party or Non-Party that designates information or items for protection under this
20 Order must take care to limit any such designation to specific material that qualifies
21 under the appropriate standards. The Designating Party must designate for protection
22 only those parts of material, documents, items, or oral or written communications that
23 qualify – so that other portions of the material, documents, items, or communications
24 for which protection is not warranted are not swept unjustifiably within the ambit of
25 this Order.

26 Mass, indiscriminate, or routinized designations are prohibited. Designations
27 that are shown to be clearly unjustified or that have been made for an improper
28 purpose (e.g., to unnecessarily encumber or retard the case development process or to

1 impose unnecessary expenses and burdens on other parties) expose the Designating
2 Party to sanctions.

3 If it comes to a Designating Party's attention that information or items that it
4 designated for protection do not qualify for protection, that Designating Party must
5 promptly notify all other Parties that it is withdrawing the mistaken designation.

6 5.2 Manner and Timing of Designations. Except as otherwise provided in this
7 Order (see, e.g., second paragraph of section 5.2(a) below), or as otherwise stipulated
8 or ordered, Disclosure or Discovery Material that qualifies for protection under this
9 Order must be clearly so designated before the material is disclosed or produced.

10 Designation in conformity with this Order requires:

11 (a) for information in documentary form (e.g., paper or electronic documents,
12 but excluding transcripts of depositions or other pretrial or trial proceedings), that the
13 Producing Party affix the legend "CONFIDENTIAL" to each page that contains
14 protected material. If only a portion or portions of the material on a page qualifies for
15 protection, the Producing Party also must clearly identify the protected portion(s) (e.g.,
16 by making appropriate markings in the margins).

17 A Party or Non-Party that makes original documents or materials available for
18 inspection need not designate them for protection until after the inspecting Party has
19 indicated which material it would like copied and produced. During the inspection and
20 before the designation, all of the material made available for inspection shall be
21 deemed "CONFIDENTIAL." After the inspecting Party has identified the documents it
22 wants copied and produced, the Producing Party must determine which documents, or
23 portions thereof, qualify for protection under this Order. Then, before producing the
24 specified documents, the Producing Party must affix the "CONFIDENTIAL" legend to
25 each page that contains Protected Material. If only a portion or portions of the material
26 on a page qualifies for protection, the Producing Party also must clearly identify the
27 protected portion(s) (e.g., by making appropriate markings in the margins).

28 (b) for testimony given in deposition or in other pretrial or trial proceedings,

1 that the Designating Party identify on the record, before the close of the deposition,
2 hearing, or other proceeding, all protected testimony.

3 (c) for information produced in some form other than documentary and for any
4 other tangible items, that the Producing Party affix in a prominent place on the exterior
5 of the container or containers in which the information or item is stored the legend
6 “CONFIDENTIAL.” If only a portion or portions of the information or item warrant
7 protection, the Producing Party, to the extent practicable, shall identify the protected
8 portion(s).

9 5.3 Inadvertent Failures to Designate. If timely corrected, an inadvertent
10 failure to designate qualified information or items does not, standing alone, waive the
11 Designating Party’s right to secure protection under this Order for such material. Upon
12 timely correction of a designation, the Receiving Party must make reasonable efforts to
13 assure that the material is treated in accordance with the provisions of this Order.

14 6. CHALLENGING CONFIDENTIALITY DESIGNATIONS

15 6.1 Timing of Challenges. Any Party or Non-Party may challenge a
16 designation of confidentiality at any time. Unless a prompt challenge to a Designating
17 Party’s confidentiality designation is necessary to avoid foreseeable, substantial
18 unfairness, unnecessary economic burdens, or a significant disruption or delay of the
19 litigation, a Party does not waive its right to challenge a confidentiality designation by
20 electing not to mount a challenge promptly after the original designation is disclosed.

21 6.2 Meet and Confer. The Challenging Party shall initiate the dispute
22 resolution process by providing written notice of each designation it is challenging and
23 describing the basis for each challenge. To avoid ambiguity as to whether a challenge
24 has been made, the written notice must recite that the challenge to confidentiality is
25 being made in accordance with this specific paragraph of the Protective Order. The
26 parties shall attempt to resolve each challenge in good faith and must begin the process
27 by conferring directly (in voice to voice dialogue; other forms of communication are
28 not sufficient) within 14 days of the date of service of notice. In conferring, the

1 Challenging Party must explain the basis for its belief that the confidentiality
2 designation was not proper and must give the Designating Party an opportunity to
3 review the designated material, to reconsider the circumstances, and, if no change in
4 designation is offered, to explain the basis for the chosen designation. A Challenging
5 Party may proceed to the next stage of the challenge process only if it has engaged in
6 this meet and confer process first or establishes that the Designating Party is unwilling
7 to participate in the meet and confer process in a timely manner.

8 6.3 Judicial Intervention. If the Parties cannot resolve a challenge without
9 court intervention, the Designating Party shall file and serve a motion to retain
10 confidentiality under Civil Local Rule 7 (and in compliance with Civil Local Rule 79-
11 5, if applicable) within 21 days of the initial notice of challenge or within 14 days of
12 the parties agreeing that the meet and confer process will not resolve their dispute,
13 whichever is earlier. Each such motion must be accompanied by a competent
14 declaration affirming that the movant has complied with the meet and confer
15 requirements imposed in the preceding paragraph. Failure by the Designating Party to
16 make such a motion including the required declaration within 21 days (or 14 days, if
17 applicable) shall automatically waive the confidentiality designation for each
18 challenged designation. In addition, the Challenging Party may file a motion
19 challenging a confidentiality designation at any time if there is good cause for doing
20 so, including a challenge to the designation of a deposition transcript or any portions
21 thereof. Any motion brought pursuant to this provision must be accompanied by a
22 competent declaration affirming that the movant has complied with the meet and
23 confer requirements imposed by the preceding paragraph.

24 The burden of persuasion in any such challenge proceeding shall be on the
25 Designating Party. Frivolous challenges, and those made for an improper purpose (e.g.,
26 to harass or impose unnecessary expenses and burdens on other parties) may expose
27 the Challenging Party to sanctions. Unless the Designating Party has waived the
28 confidentiality designation by failing to file a motion to retain confidentiality as

described above, all parties shall continue to afford the material in question the level of protection to which it is entitled under the Producing Party's designation until the court rules on the challenge.

7. ACCESS TO AND USE OF PROTECTED MATERIAL

7.1 Basic Principles. A Receiving Party may use Protected Material that is disclosed or produced by another Party or by a Non-Party in connection with this case only for prosecuting, defending, or attempting to settle this litigation. Such Protected Material may be disclosed only to the categories of persons and under the conditions described in this Order. When the litigation has been terminated, a Receiving Party must comply with the provisions of section 13 below (FINAL DISPOSITION).

Protected Material must be stored and maintained by a Receiving Party at a location and in a secure manner that ensures that access is limited to the persons authorized under this Order.

7.2 Disclosure of "CONFIDENTIAL" Information or Items. Unless otherwise ordered by the court or permitted in writing by the Designating Party, a Receiving Party may disclose any information or item designated "CONFIDENTIAL" only to:

(a) the Receiving Party's Outside Counsel of Record in this action, as well as employees of said Outside Counsel of Record to whom it is reasonably necessary to disclose the information for this litigation and who have signed the "Acknowledgment and Agreement to Be Bound" that is attached hereto as Exhibit A;

(b) the officers, directors, and employees (including House Counsel) of the Receiving Party to whom disclosure is reasonably necessary for this litigation and who have signed the "Acknowledgment and Agreement to Be Bound" (Exhibit A);

(c) Experts (as defined in this Order) of the Receiving Party to whom disclosure is reasonably necessary for this litigation and who have signed the "Acknowledgment and Agreement to Be Bound" (Exhibit A);

(d) the court and its personnel;

(e) court reporters and their staff, professional jury or trial consultants, mock

1 jurors, and Professional Vendors to whom disclosure is reasonably necessary for this
2 litigation and who have signed the “Acknowledgment and Agreement to Be Bound”
3 (Exhibit A);

4 (f) during their depositions, witnesses in the action to whom disclosure is
5 reasonably necessary and who have signed the “Acknowledgment and Agreement to
6 Be Bound” (Exhibit A), unless otherwise agreed by the Designating Party or ordered
7 by the court. Pages of transcribed deposition testimony or exhibits to depositions that
8 reveal Protected Material must be separately bound by the court reporter and may not
9 be disclosed to anyone except as permitted under this Stipulated Protective Order.

10 (g) the author or recipient of a document containing the information or a
11 custodian or other person who otherwise possessed or knew the information.

12 (h) any mediator or settlement officer, and their supporting personnel,
13 mutually agreed upon by any of the parties engaged in settlement discussions.

14 8. PROTECTED MATERIAL SUBPOENAED OR ORDERED PRODUCED IN
15 OTHER LITIGATION

16 If a Party is served with a subpoena or a court order issued in other litigation that
17 compels disclosure of any information or items designated in this action as
18 “CONFIDENTIAL,” that Party must:

19 (a) promptly notify in writing the Designating Party. Such notification shall
20 include a copy of the subpoena or court order;

21 (b) promptly notify in writing the party who caused the subpoena or order to
22 issue in the other litigation that some or all of the material covered by the subpoena or
23 order is subject to this Protective Order. Such notification shall include a copy of this
24 Stipulated Protective Order; and

25 (c) cooperate with respect to all reasonable procedures sought to be pursued by
26 the Designating Party whose Protected Material may be affected.

27 If the Designating Party timely seeks a protective order, the Party served with
28 the subpoena or court order shall not produce any information designated in this action

1 as “CONFIDENTIAL” before a determination by the court from which the subpoena
2 or order issued, unless the Party has obtained the Designating Party’s permission. The
3 Designating Party shall bear the burden and expense of seeking protection in that court
4 of its confidential material – and nothing in these provisions should be construed as
5 authorizing or encouraging a Receiving Party in this action to disobey a lawful
6 directive from another court.

7 9. A NON-PARTY’S PROTECTED MATERIAL SOUGHT TO BE PRODUCED
8 IN THIS LITIGATION

9 (a) The terms of this Order are applicable to information produced by a Non-
10 Party in this action and designated as “CONFIDENTIAL.” Such information produced
11 by Non-Parties in connection with this litigation is protected by the remedies and relief
12 provided by this Order. Nothing in these provisions should be construed as prohibiting
13 a Non-Party from seeking additional protections.

14 (b) In the event that a Party is required, by a valid discovery request, to produce
15 a Non-Party’s confidential information in its possession, and the Party is subject to an
16 agreement with the Non-Party not to produce the Non-Party’s confidential information,
17 then the Party shall:

18 (1) promptly notify in writing the Requesting Party and the Non-Party
19 that some or all of the information requested is subject to a confidentiality
20 agreement with a Non-Party;

21 (2) promptly provide the Non-Party with a copy of the Stipulated
22 Protective Order in this litigation, the relevant discovery request(s), and a
23 reasonably specific description of the information requested; and

24 (3) make the information requested available for inspection by the Non-
25 Party.

26 (c) If the Non-Party fails to object or seek a protective order from this court within
27 14 days of receiving the notice and accompanying information, the Receiving Party
28 may produce the Non-Party’s confidential information responsive to the discovery

1 request. If the Non-Party timely seeks a protective order, the Receiving Party shall not
2 produce any information in its possession or control that is subject to the
3 confidentiality agreement with the Non-Party before a determination by the court.
4 Absent a court order to the contrary, the Non-Party shall bear the burden and expense
5 of seeking protection in this court of its Protected Material.

6 10. UNAUTHORIZED DISCLOSURE OF PROTECTED MATERIAL

7 If a Receiving Party learns that, by inadvertence or otherwise, it has disclosed
8 Protected Material to any person or in any circumstance not authorized under this
9 Stipulated Protective Order, the Receiving Party must immediately (a) notify in writing
10 the Designating Party of the unauthorized disclosures, (b) use its best efforts to retrieve
11 all unauthorized copies of the Protected Material, (c) inform the person or persons to
12 whom unauthorized disclosures were made of all the terms of this Order, and (d)
13 request such person or persons to execute the “Acknowledgment and Agreement to Be
14 Bound” that is attached hereto as Exhibit A.

15 11. INADVERTENT PRODUCTION OF PRIVILEGED OR OTHERWISE
16 PROTECTED MATERIAL

17 When a Producing Party gives notice to Receiving Parties that certain
18 inadvertently produced material is subject to a claim of privilege or other protection,
19 the obligations of the Receiving Parties are those set forth in Federal Rule of Civil
20 Procedure 26(b)(5)(B). This provision is not intended to modify whatever procedure
21 may be established in an e-discovery order that provides for production without prior
22 privilege review. Pursuant to Federal Rule of Evidence 502(d) and (e), insofar as the
23 parties reach an agreement on the effect of disclosure of a communication or
24 information covered by the attorney-client privilege or work product protection, the
25 parties may incorporate their agreement in the stipulated protective order submitted to
26 the court.

27 12. MISCELLANEOUS

28 12.1 Right to Further Relief. Nothing in this Order abridges the right of any

1 person to seek its modification by the court in the future.

2 12.2 Right to Assert Other Objections. By stipulating to the entry of this
3 Protective Order no Party waives any right it otherwise would have to object to
4 disclosing or producing any information or item on any ground not addressed in this
5 Stipulated Protective Order. Similarly, no Party waives any right to object on any
6 ground to use in evidence of any of the material covered by this Protective Order.

7 12.3 Filing Protected Material. Without written permission from the
8 Designating Party or a court order secured after appropriate notice to all interested
9 persons, a Party may not file in the public record in this action any Protected Material.
10 A Party that seeks to file under seal any Protected Material must comply with Civil
11 Local Rule 141. Protected Material may only be filed under seal pursuant to a court
12 order authorizing the sealing of the specific Protected Material at issue. Pursuant to
13 Civil Local Rule 141, a sealing order will issue only upon a request establishing that
14 the Protected Material at issue is privileged, protectable as a trade secret, or otherwise
15 entitled to protection under the law. If a Receiving Party's request to file Protected
16 Material under seal pursuant to Civil Local Rule 79-5(d) is denied by the court, then
17 the Receiving Party may file the information in the public record pursuant to Civil
18 Local Rule 79-5(e) unless otherwise instructed by the court.

19 13. FINAL DISPOSITION

20 Within 60 days after the final disposition of this action, as defined in paragraph
21 4, each Receiving Party must return all Protected Material to the Producing Party or
22 destroy such material. As used in this subdivision, "all Protected Material" includes all
23 copies, abstracts, compilations, summaries, and any other format reproducing or
24 capturing any of the Protected Material. Whether the Protected Material is returned or
25 destroyed, the Receiving Party must submit a written certification to the Producing
26 Party (and, if not the same person or entity, to the Designating Party) by the 60 day
27 deadline that (1) identifies (by category, where appropriate) all the Protected Material
28 that was returned or destroyed and (2) affirms that the Receiving Party has not retained

1 any copies, abstracts, compilations, summaries or any other format reproducing or
2 capturing any of the Protected Material. Notwithstanding this provision, Counsel are
3 entitled to retain an archival copy of all pleadings, motion papers, trial, deposition, and
4 hearing transcripts, legal memoranda, correspondence, deposition and trial exhibits,
5 expert reports, attorney work product, and consultant and expert work product, even if
6 such materials contain Protected Material. Any such archival copies that contain or
7 constitute Protected Material remain subject to this Protective Order as set forth in
8 Section 4 (DURATION).

9
10 ORDER

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12 PURSUANT TO STIPULATION, IT IS SO ORDERED.

13 Dated: April 7, 2022

14 
15 CAROLYN K. DELANEY
16 UNITED STATES MAGISTRATE JUDGE
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